In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 417

DAISY B. HORST, Executrix of the Estate of E. Clemens Horst, deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Daisy B. Horst, Executrix of the Estate of E. Clemens Horst, deceased, respectfully shows:

This is a petition for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Ninth Circuit, which affirmed a decision of The Tax Court of the United States finding a deficiency of gift tax in the amount of $9708 due from the petitioner.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The Circuit Court of Appeals applied the wrong statute in deciding the case, with the result that its decision is at variance with the pronouncements of this Court, and also with decisions of the Circuit Court of Appeals for the Third Circuit.

The case involves the question whether the surrender by a wife to her husband of her interest in certain California community property acquired prior to 1927, was a "fair consideration in money or money's worth," within the meaning of Section 320 of the Revenue Act of 1924, for his conveyance of other similar community property to her as her separate property.

The Circuit Court of Appeals based its decision entirely upon the gift tax provisions of the Revenue Act of 1932, which differed in language and meaning from the gift tax provisions of the statute applicable here, the Revenue Act of 1924. The Revenue Act of 1924 required only a "fair consideration" to exempt a transfer from tax; the Revenue Act of 1932 required an "adequate and full consideration." The court held that the surrender of the wife's interest was not an "adequate and full consideration," and that therefore a tax was due on the transfer by the husband.

OPINIONS BELOW

The decision of The Tax Court (R. 25), is reported in 3 Tax Court of the United States Reports, page 417. The decision of the United States Circuit Court of Appeals for the Ninth Circuit (R. 43) had not been reported at the time this petition was prepared.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. 347), and under Section 1141(a) of the Internal Revenue Code (26 U.S.C. 1141(a)).

The judgment of the United States Circuit Court of Appeals was entered June 5, 1945 (R. 47). A timely petition for rehearing was filed, and was denied August 2, 1945 (R. 48). On August 7, 1945, the Court entered an order staying its mandate to The Tax Court until after this Court passes upon a petition for certiorari, if such petition be filed on or before September 15, 1945.

STATUTES INVOLVED

The transfer involved here was made in 1925; the applicable statute was therefore the Revenue Act of 1924 (43 Stat. 313 et seq.). Section 319 of that Act imposed a tax upon transfers "by gift * * * of any property" (43 Stat. 313). Section 320 of the Act provided in part:

> "Where property is sold or exchanged for less than *a fair consideration in money or money's worth* then the amount by which the fair market value of the property exceeded the consideration received, shall * * * be deemed a gift." (43 Stat. 314).

The Revenue Act of 1924 became effective on June 2, 1924 (43 Stat. 253) and its gift tax provisions were in effect until January 1, 1926. They were repealed effective as of the latter date by Section 1200 of the Revenue Act of 1926 (44 Stat. 125).

The Revenue Act of 1932 became effective on June 6, 1932; and its gift tax provisions applied only to transfers

made after that date (Revenue Act of 1932, Sec. 501(a) and (b), 47 Stat. 245).

Section 503 of the Revenue Act of 1932 provided in part:

> "Where property is transferred for less than an *adequate* and *full* consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration, shall * * * be deemed a gift * * *." (47 Stat. 247).

Section 503 of the Revenue Act of 1932, requiring an "adequate and full" consideration to exempt a transfer from tax, was the statute relied upon by the Ninth Circuit Court of Appeals, instead of the statute that obviously applied, §320 of the Revenue Act of 1924, which required only a "fair" consideration.

QUESTIONS PRESENTED

The questions are:

1. Whether the court below erred in upholding a gift tax assessment on the ground that the transfer in question was not supported by an "adequate and full consideration," where the applicable statute purported to tax only such transfers as were not supported by a "fair consideration."

2. Whether the surrender by a wife to her husband of her community interest in certain California community property acquired prior to 1927 was a "fair consideration in money or money's worth" (within the meaning of Section 320 of the Revenue Act of 1924), for his transfer of similar community property to her as her separate property.

REASONS FOR GRANTING THE WRIT

The effect here given to Section 320 of the Revenue Act of 1924 is, we submit, in conflict with the decisions of this Court and also with decisions of another Circuit Court of Appeals on the same matter.

The decision imposes a tax on a transfer which the statute did not intend, since the consideration given was a "fair consideration in money or money's worth," under the authorities, and that is all the statute required.

By deciding the case on the basis of the wrong statute, the court in effect failed to afford petitioner the review of The Tax Court's decision to which petitioner is entitled. The court below thus so departed from the usual course as to call, we submit, for exercise of this Court's supervisory powers.

STATEMENT OF THE CASE

In 1925 E. Clemens Horst and Daisy B. Horst, who were married in 1893, and were residents of California (R. 23), owned 4052 shares of the stock of E. Clemens Horst Company. On April 11, 1925, by an agreement in writing, E. Clemens Horst conveyed 2026 shares of this stock to Daisy B. Horst as her separate property, in consideration of her conveyance of the remaining 2026 shares to him as his separate property (R. 23).

Respondent determined that the transaction constituted a taxable gift of 2026 shares by E. Clemens Horst, and accordingly asserted a deficiency of gift tax under the Revenue Act of 1924. Petitioner filed a timely petition to The Tax Court, which upheld the Commissioner's determination (R. 21, 27).

The Tax Court's Decision

The Tax Court did not construe the term "fair consideration in money or money's worth," contained in Section 320 of the Revenue Act of 1924, although this was a vital issue in the case. Nor did The Tax Court make an independent analysis of the nature or incidents of a wife's interest in California community property acquired prior to 1927, so as to determine whether her interest is sufficiently substantial and valuable prior to the husband's death to meet the statutory requirement of a "fair" consideration.

Instead, The Tax Court relied upon a decision of the Ninth Circuit Court of Appeals, *Gillis v. Welch* (C.C.A. 9th, 1935) 80 F.(2d) 165, Cert. Den. 297 U.S. 722, which The Tax Court thought compelled the conclusion that a wife had "no estate of value" (R. 26) in California community property acquired prior to 1927,* and that therefore Mrs. Horst's surrender of her community rights in the shares (which thereby became Mr. Horst's separate property), did not constitute any consideration for the transfer by him to her of other shares (R. 25).

In fact, what the *Gillis* case held was that the wife had no vested property interest in such community property, and that therefore a gift of such property by a husband to his wife constitutes a gift of the whole property. The court had no occasion to consider the vital question

*California Civil Code, Section 161a, which gave the wife a vested interest in community property (*U. S. v. Malcolm* (1931), 282 U.S. 792), did not become effective until July 28, 1927, and did not apply to the community property acquired prior to that date. *Spanfelner v. Meyer* (1942), 51 Cal. App.(2d) 390. The community stock involved in this case was, of course, acquired prior to 1927; and hence Mrs. Horst's interest in it was not vested.

in the present case, namely, whether the wife's legal rights with respect to such community property are sufficiently substantial for their release by her to constitute a fair consideration.

Otherwise stated, the question in the *Gillis* case was, what passes on a transfer of community property by a husband to his wife;—the question here is whether the rights surrendered by a wife, when she surrenders her rights with respect to such community property, are sufficiently substantial to constitute a fair consideration.

It follows that neither the premise nor the conclusion in the *Gillis* case is relevant here. *A fortiori,* The Tax Court erred in holding that the *Gillis* case compelled the result reached.

Decision of the Court Below

The Circuit Court of Appeals affirmed the decision of The Tax Court, but on a wholly different ground, namely, that the test to be applied is whether there was a "*adequate and full* consideration" for the conveyance by Mr. Horst. As shown above, this is the requirement imposed by the gift tax provisions of the Revenue Act of 1932, as contrasted with "*fair* consideration," all that was acquired by the Revenue Act of 1924, the applicable statute.

The opinion of the court below is not wholly clear, but does plainly rest the decision on the 1932 Act. The court relies for its conclusion on the decisions of this Court in *Commissioner v. Wemyss* (1945), 324 U.S. 303, and *Merrill v. Fahs* (1945), 324 U.S. 308, both decided under the 1932 Act. Speaking first of *Merrill v. Fahs,* the court below says,

> "The Supreme Court decided that the phrase 'an adequate and full consideration in money or money's worth' came into the gift tax by way of estate tax provisions. In interpreting the estate tax provision, the Supreme Court said Congress intended the phrase 'an adequate and fair consideration in money or money's worth' to exclude dower and other marital rights, citing C. I. R. v. Bristol, 121 F.(2d) 129, and Sheets v. C. I. R., 95 F.(2d) 727. In the Merrill case, the Supreme Court held that the same words in the gift tax should be given the same meaning." (R. 46)

It will be observed that the court below first makes reference, in quotation marks, to the phrase, "adequate and full consideration" (which is the term used in the 1932 Act), and in the following sentence to "adequate and fair consideration." The latter phrase, so far as we are aware, does not appear in any statute or relevant case. In any event, the court below plainly held that consideration for such a transfer must be, among other things, "adequate" (which simply was not true under the statute applicable here); and rests its decision on cases in which this Court applied the 1932 Act requiring "adequate and full consideration."

Like The Tax Court (but doubtless for different reasons since it was applying the wrong statute), the court below expressed the view that the surrender by the wife of her community interest in California community property acquired prior to 1927 could not be consideration within the meaning of the Act, because the wife's interest was not a "vested" interest. The court said (R. 44):

> "In California, until the adoption of Section 161a of the Civil Code in 1927, the wife had no vested

> interest. [Citing cases] It follows therefore that E. Clemens Horst owned the entire holding of stock and by this instrument merely gave one-half of his stock to his wife."

But as shown above, the conclusion does not follow, the question here being whether the rights, powers and privileges which the wife surrendered (whether denominated "vested" property rights or not), constituted fair consideration for the transfer which she received in exchange.

The controlling questions were not passed on by either court below.

The controlling questions are: (a) the scope of the term "fair consideration" in the Revenue Act of 1924, and (b) the question whether the wife's surrender of her rights and powers with respect to California community property acquired prior to 1927 is of sufficient value to constitute "fair" consideration for the transfer to her by her husband of similar community property.

The foregoing summary of the decisions below is sufficient, we believe, to show that neither of these questions was really passed upon by either court. We will not stop further to analyze the opinions below on this question, since both are very short (R. 25), (R. 43).

Under California law, the wife's community property interest was of substantial value.

It is unnecessary to labor the point that although the question, whether the surrender of the wife's community property rights was a "fair consideration," is a federal

question, the qualities of the wife's rights thus surrendered is determined by the law of the State of California.

The substantial value of the wife's rights, powers and privileges with respect to such community property, is sufficiently shown by the case of *Estate of Brix* (1919), 181 Cal. 667, dealing with community property acquired prior to 1927.

That case, moreover, is persuasive authority directly on the question whether the surrender of the wife's interest supplies a "fair consideration,"—this because it held that under the state inheritance tax act, a transfer of community property by husband and wife was not a taxable transfer "without valuable and adequate consideration" where made in consideration of the wife's surrender of her community rights.

The court's summary of the group of rights which the wife transferred when she surrendered her rights with respect to such community property, reads as follows:

> "While the wife has no title to the community property nor estate or interest therein, yet she has rights in relation thereto, the surrender of which may constitute a valuable and, according to the circumstances of the case, an adequate consideration for the transfer. She has a 'possible interest in whatever remains upon the dissolution of the community otherwise than by her own death.' (In re Burdick, 112 Cal. 393 (44 Pac. 735).) Upon the death of the husband she takes one-half of the community property and upon a divorce she may, in a proper case, be awarded even the whole of it. (Civ. Code, secs. 146, 1402.) If a divorce is granted without any disposition of the community property, the former wife becomes the owner of one-half of the community property as tenant in

> common with her former husband. [Citing cases] If the husband makes a gift of community property without the wife's consent she may upon his death recover from the donee one-half of the property so given. (Civ. Code, sec. 172; Dargie v. Patterson, supra.) The fact that she may thus attack a conveyance by the husband made without her consent, on the ground that it was a gift, has a practical application that renders it a great disadvantage to a husband not in cordial relations with his wife. It has become the universal custom with purchasers of real property to insist on her signature to all contracts relating thereto. The custom is so general that it is a matter of common knowledge of which the court may take judicial notice.* [Citing cases] In the actual dealings of the husband in community real estate this gives her a practical control or power of interference which may be a great burden to him." (181 Cal., pp. 674, 676)

It is unreasonable (we submit) to say that the surrender by the wife of rights, powers and privileges, including all of those enumerated in the passage just quoted, does not constitute a "fair consideration."

The history of the revenue acts emphasizes that "fair" consideration need not be either "full" or "adequate."

Two decisions by this Court trace the history of a number of parallel provisions in the estate and gift tax laws, namely, *Taft v. Commissioner* (1938), 304 U.S. 351 and

*Since 1917 the statute has required that the wife join in any conveyance or encumbrance or community real property, or any lease of it for a period of more than one year. Cal. Civ. Code, Sec. 172a.

Merrill v. Fahs (1945), 324 U.S. 308. They show that various provisions dealing with the consideration for transfers of one kind or another, have appeared in the estate law since at least as early as 1916, and in the gift tax law since 1924; that the changes made in the two laws from time to time were closely related, and that substitution of the requirement of "adequate and full consideration," in place of the former provision requiring merely "fair" consideration, effected a subtantial change in the law.

The Revenue Acts of 1916, 1918 and 1921 contained estate tax provisions allowing deductions for claims against the estate if "allowed by the laws of the jurisdiction * * * under which the estate is being administered." The Acts of 1916, 1918, 1921 and 1924 excepted from taxable transfers in contemplation of death, sales for a "fair consideration in money or money's worth." The Act of 1924 changed the provision concerning deductible claims against the estate, so as to permit deduction only of claims supported by a "fair consideration in money or money's worth." The Act of 1924 used this same phrase with respect to the gift tax, first imposed by that act.

In 1926 (the courts having held that a release of inchoate dower rights was a "fair consideration"), the provision in the estate tax law concerning deductible claims, and also that concerning transfers in contemplation of death, were changed to require "adequate and full" consideration. This language was adopted when the gift tax was revived in 1932 (there having been no gift tax from 1926 to 1932).

In the *Taft* case, *supra*, the Court said:

> "Congress had reason to think that the phrase 'fair consideration' would be held to comprehend an in-

stance of a promise which was honest, reasonable, and free from suspicion whether or not the consideration for it was, strictly speaking, adequate.* The words 'adequate and full consideration' were substituted by §303(a)(1) of the Act of 1926. There must have been some reason for these successive changes. It seems evident that the purpose was to narrow the class of deductible claims, and we are not at liberty to ignore this purpose." (304 U.S., pp. 355, 356)

In *Merrill v. Fahs, supra,* the Court said, in part:

"The two types of tax thus followed a similar course, like problems and purposes being expressed in like language. In this situation, courts held that 'fair consideration' included relinquishment of dower rights. [Citing cases] Congress was thus led, as we have indicated, to substitute in the 1926 Revenue Act, the words 'adequate and full consideration' in order to narrow the scope of tax exemptions. [Citing cases]"

Since the *Merrill* case is so recent, we refrain from further analysis of the opinion therein; but call attention to the fact that the whole opinion bears directly on the questions here presented, the decision in this case being, as we submit, in conflict therewith.

This decision conflicts with decision of another Circuit Court of Appeals.

The decision below is, we submit, in conflict with the decisions of the Circuit Court of Appeals for the Third Circuit in *Ferguson v. Dickson* (C.C.A. 3d, 1924), 300 F.

*Citing *Ferguson v. Dickson, infra.*

961, cert. den. 266 U.S. 628, and *McCaughn v. Carver* (C.C.A. 2d, 1927), 19 F.(2d) 126.

Both *Ferguson v. Dickson* and *McCaughn v. Carver, supra,* held that the relinquishment of inchoate marital rights in property (in these cases inchoate dower) was a fair consideration in money or money's worth within the meaning of the estate tax provisions of the Revenue Act of 1918. *Ferguson v. Dickson* defined a fair consideration as "a consideration which under all the circumstances is honest, reasonable, and free from suspicion, whether or not strictly 'adequate or full.'" 300 F. 964. This definition was confirmed by *McCaughn v. Carver,* in which the Court said:

> "The substantial element the law considers is not so much the form as the good faith and the fair construction of the transaction." (19 F.(2d) 127)

These cases cannot be reconciled with the decision in the instant case. Inchoate dower, and the wife's rights in California community property acquired prior to 1927, are very similar in nature during the husband's lifetime. Neither of them becomes vested until the husband's death; neither of them ripens into possession or enjoyment until that time, but they both have certain incidents during the husband's lifetime that make them substantial and valuable. Indeed, a careful analysis of the two interests shows that the wife's interest in community property is the more valuable and substantial of the two.

And independently of those cases, it is, we believe, apparent that, under California law, the wife's rights and powers with respect to such property are substantial indeed; and their surrender constitutes fair consideration

for the husband's transfer of other property, as was held by the Supreme Court of California in a similar case.

CONCLUSION

It is submitted that the writ should be granted because of the conflict between the decision in this case, on the one hand, and the decisions of this Court and the Circuit Court of Appeals for the Third Circuit, on the other; and in order that a proper review of the decision of The Tax Court may be had on the basis of consideration of the controlling statute, which was in effect ignored by the court below.

Dated: San Francisco, California,
September 8, 1945.

Respectfully submitted,

MAURICE E. HARRISON,
Attorney for Petitioner.

THEODORE R. MEYER,
ROBERT H. WALKER,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted this.....day of September, 1945.

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Attorney for Respondent

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 417

DAISY B. HORST, EXECUTRIX OF THE ESTATE OF E. CLEMENS HORST, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 43–46) is reported at 150 F. 2d 1. The opinion of the Tax Court (R. 25–26) is reported at 3 T. C. 417.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 5, 1945 (R. 47). A petition for rehearing was denied on August 2, 1945 (R. 48). The petition for a writ of certiorari was filed on September 10, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below erred in holding that a transfer in 1925 by the decedent to his wife of 2,026 shares of stock which, under California law, was community property, constituted a taxable gift under Sections 319 and 320 of the Revenue Act of 1924.

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253:

> SEC. 319 [as amended by Section 324 of the Revenue Act of 1926, c. 27, 44 Stat. 9]. For the calendar year 1924 and the calendar year 1925, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: * * *
>
> SEC. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax im-

posed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Treasury Regulations 67, promulgated under the Revenue Act of 1924:

ARTICLE 1. *Transfers reached.*—At common law the term "gift" is applied only to voluntary transfers of property made without consideration or compensation therefor. But the taxing act with which these regulations deal employs the term "gift" in a wider and more comprehensive sense, for, while it embraces transactions which at common law amount to gifts, it goes further by including sales and exchanges for less than a fair consideration in money or money's worth. (See sec. 320.) Hence, the statute reaches and taxes all transfers of property made during the calendar year (other than the gifts specified in par. (3) of subdivision (a) and in par. (2) of subdivision (b) of sec. 321), to the extent that they are donative in character and exceed the authorized deductions.

* * * * *

A sale or exchange for a consideration reducible to a money value which is less than a fair consideration amounts to a gift, within the meaning of the statute, to the extent that the fair market value of the property, at the time of the transfer, exceeds the consideration received. If the consideration is not reducible to a money value it is to be wholly disregarded. A

transfer which is neither a sale nor an exchange does not involve a gift if there is a valid, even if not an adequate, consideration for the transfer.

* * * * *

Civil Code of California:

Section 161a: (effective July 29, 1927)

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

Section 172a:

The husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole

lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.

STATEMENT

This case involves a deficiency in gift taxes under the Revenue Act of 1924 asserted against the estate of E. Clemens Horst, deceased. He and Daisy B. Horst, the petitioning executrix, were married in 1893, and from that time until his death they resided together as husband and wife in the State of California (R. 23).

On April 11, 1925, the decedent and his wife owned at least 4,052 shares of the capital stock of E. Clemens Horst Company, all of which constituted community property under the laws of the State of California (R. 23–24). On that date the decedent and his wife entered into an agreement, the terms of which were fully carried out, which provided as follows (R. 23–25):

> This Agreement, made this 11th day of April, 1925, by and between E. Clemens Horst and Daisy B. Horst, his wife, both of the City and County of San Francisco, State of California, witnesseth:
>
> That Whereas there now stands in the name of the undersigned, E. Clemens Horst, four thousand fifty-two (4052) shares of the capital stock of E. Clemens Horst Company, a New Jersey corporation, evidenced by certificates of stock Numbers 238 and 258 of said corporation; and
>
> Whereas, said corporate stock is the community property of the parties hereto and it is the desire of the parties hereto that said corporate stock should be equally divided between them so that each one shall hold one-half thereof as his or her separate property;
>
> Now, Therefore, It Is Hereby Agreed between the said parties as follows:
>
> First: Said E. Clemens Horst hereby assigns, transfers and conveys unto said Daisy B. Horst, two thousand twenty-six

(2026) shares of said capital stock to be held by her as her separate property;

Second: The said Daisy B. Horst hereby assigns, transfers and conveys to said E. Clemens Horst the remaining two thousand twenty-six (2026) shares of said capital stock to be held by him as his separate property with full and unrestricted ownership of the same, including full testamentary power over the same.

In Witness Whereof the parties hereto have hereunto set their hands the day and year first herein written.

E. CLEMENS HORST
DAISY B. HORST.

No return was filed for gift tax because of the transfer until May 23, 1942 (R. 6, 16). At that time a return was filed by Mrs. Horst, acting as executrix for the estate of her deceased husband (R. 6, 16). On December 9, 1942, the Commissioner of Internal Revenue sent her a notice of deficiency in gift tax under the Revenue Act of 1924 (R. 12–15), and a petition for redetermination of that deficiency was filed with the Tax Court (R. 4–11). The original deficiency was based upon a value of $320 per share for the stock transferred to Mrs. Horst (R. 15), but at the trial before the Tax Court it was agreed that the value of the stock on the date of transfer was $200 per share (R. 19–20). The Tax Court sustained the Commissioner's determination (R. 25–26), and entered judgment for a reduced deficiency in

the sum of $9,708 (R. 27). Its decision was affirmed by the Circuit Court of Appeals (R. 43–46, 47).

ARGUMENT

It is submitted that the court below correctly held that the value of the 2,026 shares of capital stock of E. Clemens Horst Company which the decedent transferred to his wife in 1925 was taxable under the gift tax provisions of the Revenue Act of 1924. The decision below is not in conflict with any other decision. The question involved, insofar as petitioner relies on the construction of language used in Section 320 of the 1924 Act, *supra,* pp. 2–3, is not now of any general importance. Accordingly, we believe there is no ground which would justify the granting of a writ of certiorari in this case.

1. The transfer by decedent to his wife of the 2,026 shares of stock in E. Clemens Horst Company under the agreement set out above constituted a gift of such stock within the meaning of Section 319 of the 1924 Act, *supra,* p. 2, regardless of the release by her of her community interest, such as it was, in the remaining 2,026 shares covered by the agreement of April 11, 1925.

While the record does not show when the stock in question was acquired, it was admittedly acquired prior (Pet. 5) to the enactment of Section 161a of the California Civil Code (effective July 29, 1927) (*supra,* p. 4), and at the time of the transfer of the stock to his wife the husband con-

sequently was, for all practical purposes, sole owner of the stock, had complete management and control of the property, and was taxable upon any income realized from it. *United States* v. *Robbins,* 269 U. S. 315; *Hirsch* v. *United States,* 62 F. 2d 128 (C. C. A. 9th), certiorari denied, 289 U. S. 735. While the California courts recognized the wife's interest in community property acquired prior to July 29, 1927, as vaguely something more than a mere expectancy (*Stewart* v. *Stewart,* 199 Cal. 318, 342; *Trimble* v. *Trimble,* 219 Cal. 340; *Travelers Ins. Co.* v. *Fancher,* 219 Cal. 351; *Moore* v. *Neighbours,* 95 Cal. App. 628), she had no rights of ownership (*McKay* v. *Lauriston,* 204 Cal. 557; *Hirsch* v. *United States, supra*). Under California law the husband could, and in this case did, make a gift of such community property to his wife as her separate property. The gift in such a case is a gift of the entire property. *Gillis* v. *Welch,* 80 F. 2d 165 (C. C. A. 9th), certiorari denied, 297 U. S. 722; see also *Kaltschmidt* v. *Weber,* 145 Cal. 596; *Logan* v. *Thorne,* 205 Cal 26; *Ballinger* v. *Ballinger,* 9 Cal. 2d 330.

Of particular application here is the decision in *Gillis* v. *Welch, supra,* where the husband made a gift to his wife of community property acquired prior to 1927 without any corresponding release by the wife of her community interest in other property. The court recognized that the husband could not give to the wife more than he had, and the only question was whether

the full value of the community property was subject to the gift tax without any reduction for the value of the wife's community interest. The court pointed out that the wife's interest or estate in community property under the laws of California did not materialize until dissolution of the community by death or divorce. At the time of the gift, as here, she had no estate or interest in the community property, and the full value was, therefore, held taxable as a gift by the husband. To the same effect is *Fish* v. *Helvering*, 75 F. 2d 769 (App. D. C.).

The fact that the decedent transferred one-half of the community property involved to his wife in an instrument which also contained her release or waiver of her community interest with respect to the other half of the property does not alter the legal effect of the transaction as a gift within the meaning of Section 319 of the Revenue Act of 1924. Compare *Ballinger* v. *Ballinger*, 9 Cal. 2d 330. The conversion of the property into separate property in the *Gillis* case necessarily involved a termination of whatever community rights the wife had in the property. Nevertheless it was recognized that the taxpayer had given the entire property to her and that in measuring the gift no deduction from the total value of the property was to be made for her community interest.

2. Even if the transfer to the decedent's wife under the agreement of April 11, 1925, be con-

sidered a sale or exchange under Section 320 of the Revenue Act of 1924, the full value of the property transferred to the wife is subject to the gift tax and the decision below should be affirmed. As a gift, the transfer was completed, and was binding on the husband. If treated as a transfer in consideration of the wife's relinquishment of her community interest in the remainder of the stock, the consideration no doubt would be sufficient under state law to make the contract binding. Compare *Taft* v. *Commissioner,* 304 U. S. 351. But it does not mean, as petitioner maintains (Pet. 11–15), that it constituted "fair consideration in money or money's worth" within Section 320. The decisions cited above, and numerous other California cases, show that the interest of the wife in community property under California law, at least prior to the 1927 enactment of Section 161a of the California Civil Code (*supra,* p. 4), could not be reduced to terms of money or money's worth. Compare *Gillis* v. *Welch,* 80 F. 2d 165 (C. C. A. 9th), certiorari denied, 297 U. S. 722. Petitioner quotes from *Estate of Brix,* 181 Cal. 667, to show the "substantial value of the wife's rights, powers and privileges with respect to such community property" (Pet. 10–11), but that case differs radically from the instant case. There the court said (p. 676) that the rights of the wife in relation to the community property "*may* constitute a valuable and, *according to the*

circumstances of the case, an adequate consideration for the transfer" [italics supplied], for purposes of the state inheritance tax law. The finding of the trial court in that case that the consideration was "adequate and valuable" within the meaning of the state inheritance tax law was sustained because, as the court pointed out (p. 677):

> The agreement, pursuant to which the transfer in question was made, amounted to more than a mere surrender by the wife of her interest in the community property. It was a complete alteration of the property relations between the parties, as authorized by section 159 of the Civil Code. Taking all the various documents together, they constituted an entire transaction by which the decedent and his wife provided for her support, divided their property interests and settled and released all claims which either might or could have in the property of the other. The wife also thereby gave up the right which she would have by law to support out of her husband's property, other than that provided by the agreement, and her rights to alimony, costs, and attorney's fees in any divorce suit or separate maintenance or other suit between them.

No such agreement was made or contemplated in this case. By the agreement of April 11, 1925 (*supra,* pp. 6–7) the wife merely waived her community interest in certain shares of stock, which interest is not shown to have had any value deter-

minable in terms of money or money's worth, as required by Section 320 of the 1924 Act.

Petitioner insists that the decision below is based upon the gift tax provisions of the Revenue Act of 1932, c. 209, 47 Stat. 169, rather than under the applicable provisions of the 1924 Act (Pet. 2, 7–9). The basis of this argument seems to be the court's reliance upon the decisions of this Court in *Commissioner* v. *Wemyss,* 324 U. S. 303, and *Merrill* v. *Fahs,* 324 U. S. 308, and the court's quotation of the words "for an adequate and fair consideration in money or money's worth" in its opinion (R. 45). There is no basis for this argument. Section 320 of the 1924 Act is quoted in a footnote to the court's opinion as the applicable statute, and the decision is based upon the fact that under California law the wife "had no vested interest" in the community property at the time of the transfer, that the decedent owned "the entire holding of stock", and that by the agreement of April 11, 1925, he "merely gave one-half of his stock to his wife" (R. 44). The court therefore properly held that the above decisions of this Court are controlling.

3. Clearly there is no conflict here with the decision of this Court in *Merrill* v. *Fahs,* 324 U. S. 308, as alleged by petitioner (Pet. 13). Petitioner's view seems to be that the decision in the *Merrill* case holds that a different quantum of consideration was contemplated by Section 320

of the 1924 Act, which used the term "fair consideraion in money or money's worth", than was contemplated by Section 503 of the 1932 Act which used the term "adequate and full consideration in money or money's worth." In so arguing, the petitioner overlooks the fact that under either Act the consideration is to be measured in "money or money's worth," which has not been done and cannot be done in this case. Furthermore, it is clear from the legislative history of this provision, and this Court's decisions in *Taft* v. *Commissioner,* 304 U. S. 351, and *Merrill* v. *Fahs, supra,* that the more specific language of the later Act was adopted to forestall a possible interpretation of the 1924 Act such as that contended for here.

Petitioner also asserts conflict with the decisions of the Circuit Court of Appeals for the Third Circuit in *Ferguson* v. *Dickson,* 300 Fed. 961, certiorari denied, 266 U. S. 628, and *McCaughn* v. *Carver,* 19 F. 2d 126 (Pet. 13–14). Although those cases arose under estate tax provisions employing similar language, they dealt with dower rights and statutory rights in lieu of dower, rather than with the community interest of the wife under California law. Furthermore, if those cases can be considered as authority for the construction petitioner advances, they would seem to have been overruled by the decisions of this Court in *Taft* v. *Commissioner, supra,* and *Merrill* v. *Fahs, supra.*

4. Finally, the issue here involved is not of sufficient general importance to justify review by this Court. It arises under the gift tax provisions of the Revenue Act of 1924, which were effective only through the year 1925, and the only case which could arise under that Act in the future would be one like the instant case where no gift tax return was filed and the statute of limitations on assessment therefore had not run.

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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OCTOBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945